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Insights

Antitrust Practice Group

The Final Word or Just the Beginning? FTC and DOJ Finalize New Antitrust Merger Guidelines

January 10, 2024

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The Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") issued a final revised version of their Merger Guidelines (the "2023 Merger Guidelines") last month following a thorough review, which included a 60-day public comment period on the draft Merger Guidelines released in July 2023 (the "Draft Guidelines").

The 2023 Merger Guidelines are significant because they identify and explain the FTC's and DOJ's merger enforcement policies and practices with respect to all M&A transactions, including deals that do not trigger filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). They also reflect the first revisions to the Horizontal Merger Guidelines in nearly 14 years. As always, while they are important, the 2023 Merger Guidelines do not have the force of law. Courts will have the final word on the agencies' new approach to merger enforcement.

In a previous alert, we explained how the Draft Guidelines deviated from prior merger guidelines and decades of agency practice. The 2023 Merger Guidelines largely retain these departures.

This Alert highlights the most significant changes from the Draft Guidelines and how we expect them to impact merger investigations and enforcement going forward. The 2023 Merger Guidelines describe the types of conduct and economic circumstances that are more likely to trigger agency scrutiny. Although they memorialize recent agency practice to some degree, the 2023 Merger Guidelines also preview the range of issues and concerns that will likely be present in agency merger reviews in 2024 and beyond. Although the 2023 Merger Guidelines may increase the time and burden associated with obtaining clearance or avoiding extended agency investigations, merging parties should still, with careful strategic planning and assistance from experienced antitrust counsel, be able to gauge regulatory risk and create a roadmap to consummate proposed transactions.

What's Changed from the Draft Guidelines?

The 2023 Merger Guidelines reflect the Biden Administration's multi-year effort to strengthen antitrust enforcement, particularly with respect to mergers. Like the Draft Guidelines, they preview the range of issues that may trigger scrutiny and be investigated in the M&A context—namely, concerns about loss of innovation; harm to labor markets; the impact of digital markets; loss of potential competition; market abuse and monopolization by dominant firms; access to competitively sensitive information; coordination; trends toward consolidation; "rollups" by private equity firms; and minority investments.

Nonetheless, there are several noteworthy changes from the Draft Guidelines:

- **Market Share-Based *Presumption* of Illegality:** The 2023 Merger Guidelines contain lower Herfindahl-Hirschman Index (HHI) thresholds than were contained in the 2010 Horizontal Merger Guidelines. This means that more transactions may receive scrutiny going forward, including those involving competitors with relatively modest market shares. Whereas the Draft Guidelines stated that a merger "should" not significantly increase market concentration, the 2023 Merger Guidelines clarify the agencies' view that mergers resulting in market concentration above certain levels creates a "legal" presumption of illegality.[1] According to 2023 Merger Guideline 1, a merger is deemed presumptively unlawful if: (i) the parties' post-merger market share is greater than 30% and the post-merger change in HHI exceeds 100; or (ii) the post-merger market is highly concentrated—defined as an HHI level exceeding 1,800—and the post-merger change in HHI is greater than 100.[2] To illustrate, a market with five competitors, each with a share of 20%, would have an HHI of 2,000 (just above the new threshold for "highly concentrated").

- **(Limited) Opportunity to Rebut Market Share Presumption:** During the comment period, DOJ and FTC officials expressed their view that the Guidelines should reflect the existing legal framework, including the presumption-rebuttal framework articulated by the DC Circuit in *United States v. Baker Hughes.*[3] This framework recognizes that mergers between competitors (even mergers between competitors with high market shares) are not *per se* unlawful. Rather, market shares and increases in concentration above certain levels may create a presumption that *can be rebutted*. The 2023 Merger Guidelines note, however, that there are limits to rebuttal: "The higher the concentration metrics over [the 2023 Merger Guidelines' HHI] thresholds, the greater the risk to competition suggested by this market structure analysis and the stronger the evidence needed to rebut or disprove it."[4]

- **Dominance No Longer Inferred from 30% Market Share**: The 2023 Merger Guidelines drop the Draft Guidelines' test of "dominant position," in which dominance was inferred from a 30% market share. In its place, the 2023 Merger Guidelines adopt a more traditional standard whereby a "dominant position" is inferred from direct evidence of market power or market shares demonstrating durable market power.[5] While the explicit withdrawal of the proposed inference is a positive change, the 2023 Merger Guidelines reflect continued concerns about dominance and exclusionary conduct, as well as the agencies' apparent skepticism towards acquisitions proposed by firms with high market shares.

- **Emphasis on Potential Harms to Innovation:** Traditional merger analysis focuses on a transaction's likely effect on market prices and output. But in recent years, antitrust enforcers and courts have focused on how mergers may impact innovation, nascent competitors and loss of potential competition. The 2023 Merger Guidelines cite the Fifth Circuit's recent opinion in *Illumina/Grail* for the proposition that the products in the relevant market need not yet be commercially available for harm in that market to be cognizable.[6] In that case, the Fifth Circuit affirmed the FTC Commission's finding that the government had properly defined an "innovation"

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1 U.S. Dep't of Justice & Fed. Trade Commission, *Merger Guidelines*, Section 2.1, at 5 (Dec. 18, 2023) [hereinafter, "2023 Merger Guidelines"].
2 *See id.*, Section 2.1, at 6. HHI is a measure of market concentration calculated by summing the squares of the individual firms' market shares of the relevant market.
3 *See, e.g.*, Speech, Dep't of Justice, *Policy Director David Lawrence of the Antitrust Division Delivers Remarks at the Georgetown Center for Business & Public Policy* (July 26, 2023) (citing *United States v. Baker Hughes Inc.*, 908 F.2d 990 (D.C. Cir. 1990), as key circuit court precent that "demands" cutting back on the prima facie and rebuttal frameworks).
4 *See* 2023 Merger Guidelines, Section 2.1, at 6.
5 *See id.*, Section 2.6, at 18.
6 *Id.*, Section 2.5A, at 14 n.28.

market for multi-cancer early detection tests, even though those products had not yet reached the market.[7] The citation of *Illumina/Grail* is notable because it suggests that the agencies will continue to focus on transactions that could impact innovation. The agencies cite this case as an endorsement of their views that an innovation market can be the subject of merger enforcement.

- **Mergers that "Limit Access" to Competitive Products or Services**: The 2023 Merger Guidelines eliminate the draft version's separate guideline addressing vertical mergers but retain the fundamental substance. Among other reforms, the 2023 Merger Guidelines reverse the earlier Vertical Merger Guidelines' recognition that many vertical mergers are procompetitive and inherently lead to efficiencies. Instead, the 2023 Merger Guidelines focus on harm to competitors that might flow from a broader array of transactions, including a vertical merger or an acquisition of a company that has a product, service, or "route to market" on which the acquiror's rivals depend.[8] The 2023 Merger Guidelines will infer a risk of harm from a merger resulting in a 50% or higher market share in the market for the product or service that a merging party's rivals may use to compete.[9]
- **Opportunity to Rebut Evidence of Coordination:** Both the Draft and 2023 Merger Guidelines explain that tacit anticompetitive coordination—that is, coordination absent an agreement—remains a focus in merger review.[10] That said, the 2023 Merger Guidelines highlight the parties' opportunity to present rebuttal evidence, including evidence of firewalls, to address concerns that a merger raises the risk that rivals will coordinate pricing, output or bids. While they offer a ray of hope to merging parties, the agencies caution that firewalls sufficient to prevent coordination are "exceedingly rare in the modern economy," in light of recent advances in technology (such as the emergence of AI).[11]
- **Internal Growth No Longer Expressly Preferred over Acquisition:** Unlike the Draft Guidelines, the 2023 Merger Guidelines eliminate the agencies' controversial statement that the "antitrust laws reflect a preference for internal growth over acquisition." That statement was derived from a concurring opinion in a 1973 US Supreme Court decision.[12] Now, the 2023 Merger Guidelines posit simply that internal growth "benefits competition."[13] The softening of this language in the 2023 Merger Guidelines is a concession that the competition laws do not express a preference for internal growth over acquisition The continued inclusion of the reference to internal growth, however, suggests that the agencies will continue to investigate certain acquisitions where they perceive that growth could have been achieved internally. This concern may be more acute in circumstances where the agencies perceive that a merger may result in the loss of a potential new entrant.
- **Trend Toward Consolidation Not Inherently Unlawful**: During the comment period, critics expressed concerns about language in the Draft Guidelines that suggested a "trend towards concentration" or "serial acquisitions" could be unlawful, separate and apart from the individual deal under review. The 2023 Merger Guidelines clarify that neither trends toward consolidation nor a series of deals are inherently unlawful. Instead, they confirm that the relevant test is whether a particular transaction is likely to "substantially lessen competition or tend to create a monopoly."[14] This change was presumably intended to bring the guidelines into line with the text of Section 7 of the Clayton Act and current jurisprudence. Courts have been skeptical about whether a series of mergers could independently violate Section 7.

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7 *Illumina, Inc. v. FTC*, No. 23-60167, slip op. at 17 (5th Cir. Dec. 15, 2023).
8 *See* 2023 Merger Guidelines, Section 2.5.A.2, at 15-16.
9 *Id.*, Section 2.5, at 16 n.30.
10 *See id.*, Section 2.3, at 8; *see also* Speech, Dep't of Justice, *Principal Deputy Assistant Attorney General Doha Mekki of the Antitrust Division Delivers Remarks at GCR Live: Law Leaders Global 2023* (Feb. 2, 2023) (stating that tacit coordination may soften competition).
11 *See* 2023 Merger Guidelines, Section 2.3, at 10.
12 *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 559 n.13 (1973) (Marshall, J., concurring) ("[S]urely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963)).
13 *See* 2023 Merger Guidelines, Section 2.4.A., at 11.
14 *See id.*, Section 2.7, at 22.

Key Takeaways from the 2023 Merger Guidelines

The 2023 Merger Guidelines scale back several of the most controversial portions of the Draft Guidelines.

- They no longer include a list of "don'ts," instead describing conduct that "can" violate the law. One exception is mergers that significantly increase concentration in a highly concentrated market. Such market structures can create legal presumptions of illegality under the 2023 Merger Guidelines.
- They clarify that parties can offer, and the agencies will consider, rebuttal evidence, including evidence of efficiencies.
- They drop the inference that a 30% market share confers a "dominant position."
- Series of acquisitions and decisions to "build" rather than "buy" are not inherently unlawful.

Nonetheless, the 2023 Merger Guidelines retain most of the important changes in the Draft Guidelines.

- They lower the concentration thresholds for triggering a presumption of illegality to pre-2010 levels and introduce a test based on market share.
- They continue to reflect skepticism of mergers that involve products or services on which competitors "depend," particularly if the combined firm will have a market share of greater than 50%.
- While parties can offer evidence of efficiencies and other rebuttal evidence, the 2023 Merger Guidelines continue to empower the agencies to determine what weight, if any, to afford such evidence.
- The 2023 Merger Guidelines continue to signal that the agencies will view serial acquisitions (*i.e.,* acquisitions of companies in the same space) and acquisitions of or by dominant firms with greater skepticism than they have in the past.

What to Expect in 2024 and Going Forward

The 2023 Merger Guidelines make clear that the agencies will continue their aggressive approach to merger enforcement. While the 2023 Merger Guidelines do not have the force of the law,[15] and courts may not agree with the approach to merger enforcement embodied in these guidelines, most merger investigations are resolved before litigation. The time and expense needed secure antitrust clearance will depend in large part on how the agencies (rather than courts) apply the 2023 Merger Guidelines to each transaction.

It is therefore prudent for merging parties to consider the 2023 Merger Guidelines when negotiating transaction agreements and advocating to the agencies. Well-prepared merging parties with strong evidence on procompetitive benefits and lack of harm to competition, supported by their documentary record still should be able to continue to consummate their deals in the current enforcement environment. This is also true for mergers that do not trigger HSR Act filings, which can be and often are investigated by the agencies.

Going forward, parties seeking to consummate transactions in 2024 and beyond should keep the following in mind, consult counsel early and plan accordingly.

- Where transactions are likely to trigger a legal presumption of illegality under 2023 Merger Guideline 1, parties should be prepared to offer strong rebuttal evidence, including economic evidence of efficiencies. And be mindful that the greater the increase in HHI levels or market shares, the stronger that rebuttal evidence will need to be.
- Despite the removal of an explicit guideline addressing vertical mergers, we anticipate that such mergers will receive continued scrutiny. Where a potential transaction involves a 50% market

[15] Both the Draft and 2023 Merger Guidelines are replete with citations to case law, including both recent decisions and decades-old precedent. The Draft Guidelines received some criticism for the heavy reliance on case law perceived to be "technically good law" but effectively superseded by subsequent case law. The use of citations, however, does not transmute the guidelines into law. Courts will continue to apply the law as set forth in settled precedent, and as they deem appropriate, may credit policies embraced in the 2023 Merger Guidelines.

share, parties should consider how and with what evidence they may be able to rebut the inference of competitive harm.

- Parties proposing transactions in markets that already are concentrated or perceived as susceptible to collusion should consider developing evidence and conducting economic analysis upfront to demonstrate that the merger will not facilitate coordination. The same is true for markets with a trend toward consolidation. Parties should focus on developing rebuttal evidence, either to disprove a theory of trending consolidation or to establish that the transaction at issue will create efficiencies or otherwise benefit competition.

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